In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 325

WILLIAM EVANS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION OF WILLIAM EVANS, PETITIONER, FOR A REHEARING.

ARTHUR D. KLANG,
[illegible] Kearny Street,
San Francisco, California,
Attorney for Petitioner.

Subject Index

Page

This court has repeatedly held that it will consider the facts, even though there has been a concurrence of two or more courts in the findings, when "there is clear error" or when "clearly erroneous" 4

Conclusion 7

Table of Authorities Cited

Pages

American Bank & Trust Co. v. Federal Reserve Bank (1923), 262 U.S. 643 7

Baumgartner v. United States (1943), 322 U.S. 665 ..... 4, 6

Beyer v. Fevre (1901), 186 U.S. 114 6

Brainard v. Buck (1901), 184 U.S. 99 6

Brown v. Allen (1952), 344 U.S. 443 6

Delaney v. United States (1923), 263 U.S. 586 2

De la Rama v. De la Rama (1907), 210 U.S. 303 6

Niemotko v. Maryland (1950), 340 U.S. 268 6

Offutt v. United States (1954), 348 U.S. 11 6

Stuart v. Hayden (1897), 169 U.S. 1 7

Texas & N. O. R. Co. v. Brotherhood of Railway & S.S. Clerks (1929), 281 U.S. 548 7

United States v. Johnson (1942), 319 U.S. 503 2

Workman v. New York (1900), 179 U.S. 552 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 325

WILLIAM EVANS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION OF WILLIAM EVANS, PETITIONER, FOR A REHEARING.

William Evans respectfully petitions for a rehearing herein upon substantial grounds. Said grounds were not presented heretofore because no occasion for urging them appeared until the brief for the United States in opposition to petitioner's petition for a writ of certiorari was filed by the Solicitor General.

Petitioner respectfully asserts that in placing reliance upon *United States v. Johnson* (1942), 319 U.S. 503, 518, and *Delaney v. United States* (1923), 263 U.S. 586, 589-590,[1] as support for the statement:[2]

> "Petitioner's challenge to the sufficiency of the evidence to support his conviction under count 3 for concealing 22 grains of marihuana, upheld by both courts below, presents no issue for review by this Court."

the Solicitor General in effect has stated to this Court that its rulings unequivocally hold that *no issue was presented by the petition for the writ*, and hence was to be denied *pro forma*, without consideration of its *merits*.

Petitioner respectfully, yet most sincerely and most insistently, asserts that such is *not* the law, and that the rule laid down in the *Johnson* and *Delaney* cases is subject to numerous qualifications and exceptions.[3]

To stress the necessity and urgency that this Court consider the qualifications and exceptions to the "rule" as stated by the Solicitor General in the light of petitioner's contention that the presumption of innocence with which he was clothed at the outset of

---

[1]These are the only cases relied upon by the Solicitor General; the other two cited cases as to circumstantial evidence and inferences present no controversial question.

[2]Page 6 of Brief for the United States in Opposition.

[3]It *could not* be otherwise—in a most flagrant case of disregard by a trial court and by a Court of Appeals of the substantial rights of a defendant (and since the Scottsborough cases who can say 'It cannot happen?') such a rule, if fixed and absolute, would tie the hands of this Court to grant any relief whatsoever. Indeed, to even *examine the petition.*

the trial was *completely ignored*, he here restates the Conclusion set forth at page 28 of his original petition:

> "Petitioner most respectfully submits that it has been abundantly established hereinabove that the Court of Appeals *by its own statement of the facts* has actually nullified the sacrosanct presumption of innocence which has surrounded a defendant for ages past—has wholly ignored the doctrine of 'any other reasonable hypothesis'—and, as well, likewise ignored the fact that the conviction of petitioner was based upon circumstantial evidence. That by reason of these matters and for all of the reasons hereinabove set forth, the writ should issue herein."

Petitioner will in nowise *here* reassert or reargue the facts or the law appertaining to his Petition for Writ of Certiorari—he will content himself with most respectfully urging that this Court—in the light of the authorities hereinafter set forth—again *consider* such facts, law, and argument. *This petition* is directed solely to establishing that, notwithstanding the contention made by the Solicitor General, the evidence in a case will be considered by this Court, even though both trial court and the court of appeals have passed upon such evidence, when the circumstances warrant. That the circumstances in the instant case *do* warrant it—do, indeed, cry out for it—is abundantly established by his original petition, to which this Court is most respectfully referred.

THIS COURT HAS REPEATEDLY HELD THAT IT WILL CONSIDER THE FACTS, EVEN THOUGH THERE HAS BEEN A CONCURRENCE OF TWO OR MORE COURTS IN THE FINDINGS, WHEN "THERE IS CLEAR ERROR" OR WHEN "CLEARLY ERRONEOUS".

Petitioner concedes that there is a *general* rule that the concurrence of two lower courts in findings of fact renders it unnecessary (but not improper or without warrant) for this Court to examine those facts. He contends merely that there are numerous exceptions to that "general" rule—that the instant case constitutes such an exception—and that it is the duty of this Court to examine his original petition in the light of the holdings of this Court that *if* the situation warrants it in a particular case the facts will be examined. Here, petitioner is confident, the Court has just such a case.

This Court, in an unanimous opinion in *Baumgartner v. United States* (1943), 322 U.S. 665-680, a case which involved the cancellation of citizenship allegedly fraudulently and illegally obtained, reversed the judgment of two lower courts setting aside the certificate of naturalization, in this language (p. 670):

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case."[1]

---

[1] In the Baumgartner situation the "particular case" was the necessity for "clear, unequivocal and convincing" proof. In the instant situation the "particular case" is the "presumption of innocence"—surely no less important.

Continuing—in language *particularly* apt to the instant case, the opinion states:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity[5] as is implied in an attempt to reduce a person to the status of an alien from that of a citizen."

The opinion continues (and we quote only because of its seemingly tailored application to the facts of the instant case):

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which the judgment

[5] In the case at bar, petitioner is languishing away ten years of his life for a conviction that was arrived at and approved only after denying him his fundamental right to the "protective" presumption of innocence.

> of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."

The *Baumgartner* case has been cited but three times in the opinions of this Court. Two of those cases concerned consideration of the findings of state courts and are not applicable here—but the same rule was maintained. (They were *Niemotko v. Maryland* (1950), 340 U.S. 268, 287, and *Brown v. Allen* (1952), 344 U.S. 443, 507.) The third case was that of *Offutt v. United States* (1954), 348 U.S. 11, where this Court, at page 15, expressly affirmed the rule originally laid down in the *Baumgartner* case.

Laying down a similar rule, and holding that the Supreme Court has both the right and the duty to examine the record and set aside the judgment if it finds that the conclusions are wholly unwarranted by the testimony, are:

Beyer v. Ferre (1901), 186 U.S. 114;
De la Rama v. De la Rama (1907), 210 U.S. 303.

Other cases holding that the so-called "rule" respecting facts determined by two lower courts does not apply where it affirmatively appears that these courts erred, or that the decision is clearly erroneous, or in the absence of adequate reasons why it should not do so, are:

Workman v. New York (1900), 179 U.S. 552;
Brainard v. Buck (1901), 184 U.S. 99;

Stuart v. Hayden (1897), 169 U.S. 1;
Texas & N. O. R. Co. v. Brotherhood of Railway & S.S. Clerks (1929), 281 U.S. 548;
American Bank & Trust Co. v. Federal Reserve Bank (1923), 262 U.S. 643.

CONCLUSION.

Petitioner repeats that he nowise *here* attempts to set forth or urge the merits of his original petition. He does urge that the office of this petition for rehearing is to persuade this Honorable Court that the original petition should be considered in the light of the power of this Court as set forth herein, since the brief of the Solicitor General (to which petitioner has heretofore had no opportunity to reply) might be misleading if considered exclusively. A rehearing of the original petition for a writ of certiorari should therefore be granted on reconsideration.

Dated, San Francisco, California,
November 5, 1958.

Respectfully submitted.

ARTHUR D. KLANG,
Attorney for Petitioner.

Certificate of Counsel.

I, Arthur D. Klang, an attorney regularly admitted to practice in the Supreme Court of the United States, and attorney for petitioner named in the foregoing Petition for Rehearing, do certify that said petition is presented in good faith and not for delay.

Dated, San Francisco, California,
November 5, 1958.

Arthur D. Klang,
Attorney for Petitioner.